

## Articles

### “EQUAL PROTECTION, MY ASS!”? *BUSH v. GORE* AND LAURENCE TRIBE’S HALL OF MIRRORS

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Almost every lawyer with litigation experience, even if only in law school moot court exercises, has experienced what might be called “acquired conviction syndrome.” Having taken on a client’s cause, and worked hard to develop the best arguments in support of that cause, one often finds oneself increasingly persuaded that the weight of the arguments supports the client’s position. This can easily happen even if one began by thinking that the case was almost certainly a loser. The prevalence of acquired conviction syndrome provides a good reason for the custom of disclosing one’s own involvement in cases on which one later offers academic commentary. This custom certainly doesn’t imply that such commentary deserves to be dismissed, or even depreciated, but it does alert the reader to the advisability of assessing the work with a little extra caution.

A very lengthy essay by Laurence H. Tribe—*eroG v. hsuB and its Disguises: Freeing Bush v. Gore from its Hall of Mirrors*<sup>1</sup>—reaches the following considered conclusion about the Court’s holding in that case: “EQUAL PROTECTION, MY ASS!”<sup>2</sup> Notwithstanding Professor Tribe’s vulgar expression of

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1. 115 Harv. L. Rev. 170 (2001).

2. In December of 2000, soon after the Supreme Court announced its decision, some Democratic voters in Florida began replacing their red-white-and-blue Gore-Lieberman buttons with black buttons with white lettering stating

contempt for the Court, his essay is extremely sophisticated. It deserves to be read carefully, though with due regard for the fact that he was deeply involved, as one of Gore's lawyers, in the litigation that culminated in the Supreme Court's decision in *Bush v. Gore*. Professor Tribe recognizes this, of course, and rightly says of his effort to offer a "more balanced" account than others have provided that "the proof of that pudding will have to be in the eating."<sup>3</sup> My own comments—which will be a great deal more concise,<sup>4</sup> and less autobiographical<sup>5</sup>—should also be read with caution. Although I was not directly involved in the litigation, I published several short pieces about the Florida election dispute while it was going on, and immediately after it was resolved.<sup>6</sup> And I wanted Bush to become President, perhaps almost as much as Professor Tribe wanted Gore to win.

Much of Professor Tribe's essay is taken up with responses to other commentators, analysis of Chief Justice Rehnquist's concurrence, and other matters that are peripheral to the central question of the legal merits of the Court's decision and opinion. Much of this extra material is quite unexceptionable, but its daunting volume and dazzling intricacy may easily distract the

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simply: "Equal Protection, My Ass!" This outburst has intuitive appeal, capturing the "where the hell did that come from?" reaction of many voters, lawyers, and academics who read the opinion. . . .

.... We have returned to where we started: with a group of disillusioned Florida voters unconvinced by the Court's equal protection rationale in any of its guises. And we're left with a badge that *rightly proclaims*: "EQUAL PROTECTION, MY ASS!"

Id. at 221-22, 247 (emphasis added, all caps in original). The passage referred to by ellipsis in this quotation, which is part of a subsection entitled "Speaking Theoretically—The Constitutional Shell Game," contains a lengthy discussion of three types of constitutional analysis that might be thought to justify the outcome in the case. Lest one wonder whether Professor Tribe endorsed the slogan on the badge when he wrote that the badge "rightly proclaims" that slogan, consider another of Professor Tribe's summaries of his conclusion:

Mesmerized by the Court's prestidigitation, voters might miss the fact that the pea has already been palmed: there is no hidden constitutional reason to uncover. None of these shells contains a defensible rationale, but each is sufficiently distracting to leave at least some observers thinking that there *must* be something valid hidden there.

Id. at 222 (emphasis in original).

3. Id. at 178-79.

4. Professor Tribe's article is 133 pages long, and it includes 533 footnotes.

5. See, e.g., Tribe, 115 Harv. L. Rev. at 172 n.†, 182-83, 277 n.433, 301-302 (cited in note 1).

6. *An Act of Courage*, The Weekly Standard 19 (Dec. 25, 2000); *Travesty in Tallahassee*, The Weekly Standard 17 (Dec. 18, 2000); *Supreme Court's Not the Last Word*, New York Post 31 (Dec. 4, 2000); *Courts Don't Own the Law*, New York Post 29 (Nov. 20, 2000). I subsequently published a detailed defense of the Court's decision in the case: *The Unbearable Rightness of Bush v. Gore*, 23 Cardozo L. Rev. 1219 (2002).

reader's eye from the absence of any solid arguments that can support Professor Tribe's two principal conclusions about the decision in *Bush v. Gore*. Those two conclusions can be stated very simply: the Court's equal protection ruling was untenable as a matter of law, and the case in any event was technically nonjusticiable.<sup>7</sup> And on the basis of these conclusions, Professor Tribe renders this further verdict: the five "Justices in the *Bush v. Gore* majority have little but disdain for Congress as a serious partner in the constitutional enterprise, and not much patience with 'We the People' as the ultimate source of sovereignty in this republic."<sup>8</sup>

Those conclusions are genuinely indefensible, and Professor Tribe is forced to rely entirely on sleights of hand in order to make them look like the results of a detached and sober analysis. The following commentary will show why Professor Tribe's brief against the Court will not withstand disinterested scrutiny.

### I. EQUAL PROTECTION AND PRECEDENT

As everyone knows, the Supreme Court's decision in *Bush v. Gore* came at the end of a complex and multifaceted process of legal and political maneuvering, much of which involved the intricacies of Florida election law. In order to understand the Court's ruling, however, one can get by with only the briefest summary of the background.<sup>9</sup>

After the initial count of the ballots, which had Bush ahead by a small margin, and an automatic recount authorized by state law, which also gave Bush a small lead, Gore asked for additional recounts by local election officials in four heavily Democratic counties. Overruling Florida's Secretary of State, the Flor-

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7. One other point deserves a brief mention. Professor Tribe appears to contend (as many other commentators have contended), that the Supreme Court forbade the Florida court from ordering a new recount on remand. Tribe, 115 Harv. L. Rev. at 263 (cited in note 1) ("The Court's only justification for ending the recount, rather than at least allowing the Florida Supreme Court to try to fashion a remedy for the supposed defects in its December 8 order . . ."); see also *id.* at 268 (referring to the Court's "decision to toss out all the remaining legal votes as of 10 p.m. on December 12, 2000"). For reasons that I have explained elsewhere, this is a demonstrably incorrect interpretation of the Court's opinion. Lund, 23 Cardozo L. Rev. at 1270-78 (cited in note 6). To their credit, some of Gore's other lawyers have refrained from endorsing this misreading of *Bush v. Gore*. See *id.* at 1277 n.185 (discussing public statements of David Boies and Ronald Klain).

8. Tribe, 115 Harv. L. Rev. at 290 (cited in note 1).

9. For a more detailed discussion of the factual and legal background, see Lund, 23 Cardozo L. Rev. at 1224-43 (cited in note 6).

ida Supreme Court granted an extension of time for these recounts to be conducted, but two of the counties failed to meet the new, court-ordered deadline. The Secretary of State then declared Bush the winner of Florida's electoral votes, and Gore filed a lawsuit making a number of demands, all of which were rejected by the trial court. Three of those demands, however, were ultimately granted by a 4-3 vote of the Florida Supreme Court, which ordered the trial court to take the following steps:

- Add a net of 215 votes (or perhaps 176, depending on a factual issue that the appellate judges did not resolve) to Gore's total, based on the Palm Beach County recount, whose results were not reported to the Secretary of State before the court-ordered deadline.
- Add a net of 168 votes for Gore to the vote totals, based on an uncompleted recount conducted in Miami-Dade County that had begun with the more heavily Democratic precincts in that jurisdiction.
- Conduct a manual recount of 9,000 Miami-Dade "undervote" ballots, which Gore claimed might shift the statewide totals in his favor.<sup>10</sup>

The Florida Supreme Court also ordered the trial court to take one more step, which Gore had *not* requested:

- Conduct a statewide recount of some kind, which the Florida Supreme Court strongly suggested should be limited to a recount of the "undervote" ballots in each county.<sup>11</sup>

The U.S. Supreme Court reversed the Florida court, holding that this four-part order (whatever its merits may have been as an interpretation of state law) violated the Equal Protection Clause. Without concluding that any one element was constitutionally fatal, the Court held that the combination of the following facts prevented the order from satisfying "the minimum requirement for non-arbitrary treatment of voters necessary to secure the fundamental right" to vote.<sup>12</sup>

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10. "Undervotes" are ballots on which a counter did not detect any choice for the office of President. Similarly, "overvotes" are ballots on which a counter detected more than one choice for President and thus registered no vote.

11. Technically, the Florida Supreme Court only required the trial court to *consider* conducting a statewide recount, perhaps because of doubts about the supreme court's jurisdiction to order the recount. The trial court did begin doing exactly what the supreme court had suggested that it do, and it has become customary to treat the supreme court's suggestion as if it had been an order. Little, if anything, turns on the distinction now.

12. 531 U.S. at 105.

- Varying standards for determining a voter's intent had been employed by the counties in which manual recounts had been held, and at least one county changed its standard repeatedly during the recount.
- Unlike the recounts in the Gore-selected counties, which had included all ballots, the statewide recount was limited to "undervotes," and did not even include the analytically indistinguishable "overvote" ballots.
- Partial results from the uncompleted recount in Miami-Dade had been used to credit one candidate with additional votes, and the Florida court evidently contemplated the future use of partial recounts.
- The statewide recount was being conducted by untrained personnel, unguided by objective standards for identifying legal votes, and observers were not permitted to make contemporaneous objections.

The Court relied for its decision primarily upon *Reynolds v. Sims*<sup>13</sup> and related decisions, including *Gray v. Sanders*<sup>14</sup> and *Moore v. Ogilvie*.<sup>15</sup> The essence of the Court's argument was that these vote-dilution cases prohibit a state from arbitrarily treating ballots differently depending on where they are cast. Acknowledging that it is impossible to treat every ballot or every voter absolutely identically in all respects, the Court concluded that the recount ordered by the Florida court was permeated with avoidable and unjustified nonuniformity, in violation of the principles established by *Reynolds*.<sup>16</sup>

In an uncharacteristically terse discussion, Professor Tribe dismisses these precedents by distinguishing them on their facts.<sup>17</sup> And he concludes his discussion of equal protection theory and doctrine by endorsing the conclusion set forth on badges

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13. 377 U.S. 533 (1964).

14. 372 U.S. 368 (1963).

15. 394 U.S. 814 (1969).

16. Professor Tribe mistakenly believes that the Court also held that the Florida court's order violated due process. Tribe, 115 Harv. L. Rev. at 177, 219, 233-34 (cited in note 1). In fact, the Supreme Court's holding was based exclusively on equal protection. See 531 U.S. at 103 ("[W]e find a violation of the Equal Protection Clause."). The Court's only comment on due process came when it remarked that "it is obvious that the recount [initiated by the Florida court] cannot be conducted in compliance with the requirements of equal protection and due process without substantial additional work." Id. at 110. Due process would, for example, require "orderly judicial review of any disputed matters that might arise." Id. This does not imply, or even suggest, that the Florida court had already violated due process.

17. Tribe, 115 Harv. L. Rev. at 222-26 (cited in note 1).

that some outraged Gore supporters began wearing after the decision: "EQUAL PROTECTION, MY ASS!"<sup>18</sup> This formulation is somewhat jarring in a piece that purports to offer a "balanced" and "measured" assessment of the Court's work,<sup>19</sup> which he elsewhere indicates has left him with "a sad lump in the throat that will, stubbornly, never go away."<sup>20</sup>

More important, expressions either of contempt or of deeply felt grief are pretty hard to reconcile with Professor Tribe's later acknowledgment that Justices Souter and Breyer, who also concluded that the Equal Protection Clause had been violated, would not have been likely to accept a transparently untenable legal theory.<sup>21</sup> Professor Tribe might also have noted, though he does not, that three Democrats dissented from the Florida Supreme Court's decision, in part for the same reasons adopted by seven members of the U.S. Supreme Court.<sup>22</sup> As we shall see, it is no coincidence that such a wide spectrum of judges all agreed that the Equal Protection Clause had been violated.

The cute vulgarity on the Gore supporters' buttons will not withstand scrutiny. Neither will the reference to a Hall of Mirrors in the title of Professor Tribe's essay. The real Hall of Mirrors is the one he himself has constructed.

#### A. THE LAW THAT APPLIED IN *BUSH V. GORE*

Perhaps it is best to begin by asking what the Gore supporters who came up with the slogan "EQUAL PROTECTION, MY ASS!" might have meant. For people who are generally familiar with the Court's work, but not immersed in the intricacies of equal protection case law, the Court's decision might well have seemed quite startling, and transparently dishonest. In many cases over the past quarter century or so, the Court has insisted that a plaintiff must show more than unequal effects: discriminatory *purpose* is ordinarily a necessary element of an equal protection claim.<sup>23</sup> The Court, including the five members of the *Bush v. Gore* majority, has been insistent about policing this limit on the reach of equal protection analysis, which has been

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18. See note 2.

19. Tribe, 115 Harv. L. Rev. at 178-79 (cited in note 1).

20. Id. at 302.

21. See id. at 292-93.

22. *Gore v. Harris*, 772 So. 2d 1243, 1267 (Wells, C.J., dissenting), 1272 (Harding, J., dissenting) (Fla. 2000), rev'd sub nom. *Bush v. Gore*, 531 U.S. 98 (2000).

23. E.g., *United States v. Armstrong*, 517 U.S. 456 (1996); *Washington v. Davis*, 426 U.S. 229 (1976).

applied, for example, in cases involving claims of racial vote-dilution.<sup>24</sup> Nor have the most conservative Justices shown much willingness to expand the reach of equal protection doctrine into new areas.<sup>25</sup> One possible exception—a telling exception for many observers—has been in the field of affirmative action, where the more conservative Justices have pushed to protect the victims of so-called reverse discrimination.<sup>26</sup>

In *Bush v. Gore*, the Court demanded no showing of discriminatory purpose or intent. Nor did the Court identify any "suspect class" or "discrete and insular minority" whose interests were threatened by a politically powerful majority. So it may have looked rather obviously as though a sudden and unexplained equal protection innovation had magically emerged from just those Justices usually most averse to such judicial activism. And just in time to rescue a Republican presidential candidate who had promised to appoint more Justices who would be reluctant to overturn the legal precedents that these same Justices had devoted their careers to establishing.

Plausible as this story might sound, and I don't doubt that many sincere supporters of Vice President Gore must have believed it, it is based on a very simple mistake. The cases that call this story forth all belong to the branch of equal protection case law that deals with so-called suspect classifications, such as race. But these "suspect classification" cases—including those dealing with racial vote dilution—have almost nothing to do with *Bush v. Gore*, which is part of a completely different line of cases usually referred to as the "fundamental rights" strand of equal protection law.

The anomalies that leap out when *Bush v. Gore* is compared with "suspect classification" cases disappear once one recognizes that this was a "fundamental rights" case. First, this latter line of cases deals mainly with voting rights, which is exactly what was involved in *Bush v. Gore*. So there was no striking innovation of

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24. E.g., *Miller v. Johnson*, 515 U.S. 900 (1995).

25. See, e.g., *Romer v. Evans*, 517 U.S. 620 (1996) (state constitutional provision prohibiting certain kinds of special legal protections for homosexuals held unconstitutional). Justice Scalia's dissent in this case was joined by Chief Justice Rehnquist and Justice Thomas.

26. E.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995), where the same five Justices who formed the majority in *Bush v. Gore* overruled a recent affirmative-action precedent, and remanded the case with instructions to apply strict scrutiny to a federal program involving set-asides for minority contractors. Cf. Tribe, 115 Harv. L. Rev. at 251 (cited in note 1) (mistakenly asserting that the Court "struck down a government set-aside" in this case).

the kind that the Court's more conservative members have resisted when other members of the Court have wanted to expand the list of "suspect classifications." Second, the Court has never required a showing of discriminatory purpose in fundamental-rights cases. It certainly would have been a major innovation if this requirement had been dropped or ignored in a suspect-classification case, but there is not and never has been any such requirement in fundamental-rights cases.

The Gore supporters who came up with the protest button may not have known about the difference between suspect-classification cases and fundamental-rights cases. Professor Tribe, however, has probably forgotten more about these cases than most people will ever know. Unfortunately, as we shall see, his analysis in this article fails to take account of some significant points about these cases.

Before we get to that, let's consider Professor Tribe's principal attack on the Court's legal analysis. Recognizing that the Court relied primarily on *Reynolds v. Sims* and related cases, Professor Tribe attempts to distinguish those cases from *Bush v. Gore*. As every lawyer knows, any case can be distinguished from any other case "on the facts," sometimes legitimately and sometimes not. The distinctions on which Professor Tribe relies are not legitimate, and they are such that even he does not consistently adhere to them.

The facts in *Reynolds v. Sims* are well known. A number of state legislatures had failed to reapportion the districts for state legislative seats after population shifts had made some of those districts much more populous than others. Professor Tribe dismisses the relevance of this case because "Florida's at-large scheme in no way implicated the *Reynolds* skewed district concern."<sup>27</sup>

Two other cases cited by the Court in *Bush v. Gore* receive similarly dismissive treatment. *Gray v. Sanders* held that state-wide elections may not be conducted under a system resembling the federal electoral college, and *Moore v. Ogilvie* that a state may not require that a nominating petition for presidential elector include the signatures of at least 200 qualified voters from each of at least 50 counties. Professor Tribe dismisses these precedents because they are "immediately distinguishable on the ground that each case involved a plan implemented by the state

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27. Tribe, 115 Harv. L. Rev. at 223 (cited in note 1).



legislature that clearly had the purpose and effect of granting greater voting power to a particular class—in both cases, rural voters."<sup>28</sup>

Are these distinctions legitimate or illegitimate? It is true that the technical holding in *Reynolds* was only that state legislative seats must be apportioned on an equipopulation basis. And the holdings in *Gray* and *Moore* are similarly limited to the specific schemes at issue in those cases. But Chief Justice Warren's opinion in *Reynolds* also articulated the broader principle on which that decision was based: "[T]he right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. . . . Weighting the votes of citizens differently, *by any method or means*, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.'"<sup>29</sup>

Contrary to Professor Tribe's suggestion, the Court has not limited the *Reynolds* principles to cases involving "skewed districts."<sup>30</sup> Nor has the Court limited the reach of those principles to schemes "that clearly had the *purpose* and effect of granting greater voting power to a particular class."<sup>31</sup> Consider, for example, *O'Brien v. Skinner*.<sup>32</sup> In this case, state law permitted absentee voting only by those who were absent from their county of residence on election day. When applied to persons in jail, it had the odd and presumably unforeseen effect of discriminating between those who were jailed in their county of residence and those who were jailed elsewhere. Although this was a vote-denial case, to which *Reynolds*' vote-dilution holding was not directly applicable, the Court held that the statute violated equal protection without even suggesting that the absence of a legislative purpose to increase the voting power of a particular class was relevant. Similarly, *Reynolds* and other opinions have condemned a variety of vote-dilution practices that have nothing to do with "skewed districts," such as altering ballots and stuffing the ballot box.<sup>33</sup>

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28. *Id.* at 225.

29. *Reynolds*, 377 U.S. at 555, 563 (emphasis added) (citations omitted).

30. Tribe, 115 Harv. L. Rev. at 223 (cited in note 1).

31. *Id.* at 225 (emphasis added).

32. 414 U.S. 524 (1974).

33. See, e.g., *Reynolds*, 377 U.S. at 555; *Anderson v. United States*, 417 U.S. 211, 227 (1974); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); *Baker v. Carr*, 369 U.S. 186, 208 (1962).

The principle actually underlying *Reynolds* and related cases is not a concern with “skewed districts,” but rather with “any method or means” of weighting votes differently depending on where voters reside. The recount scheme devised by the Florida Supreme Court was unique in history, so of course there could be no legal precedent exactly on point. But Florida voters were certainly treated differently depending on where they lived. Most obviously, voters who had their “overvote” ballots manually reexamined in the four counties that Gore selected for hand recounts were more likely to have their votes count than those who cast similar ballots elsewhere. Similarly, voters who cast “dimpled chad” ballots in Broward County were treated differently than those who cast similar ballots in Palm Beach. Voters living in the unrecounted (and more Republican) precincts of Miami-Dade did not have their ballots manually reexamined, while those living in the recounted (and more Democratic) precincts did. The differential treatment of voters by the Florida court may seem arbitrary in a way that a settled plan to disadvantage rural voters does not, but the Court has never held that such a settled plan is a necessary element of an equal protection violation, and *O’Brien* illustrates that even inadvertently arbitrary voting schemes can violate the Constitution.

The differences in the way Florida voters were treated, moreover, were not *randomly* arbitrary. The Florida court largely accepted one litigant’s self-serving requests in a particular election, and it did so at a time when any recount could help only that particular candidate (because his opponent had already been certified as the winner of the election by Florida’s Secretary of State). Even if one assumes that the Florida court’s extraordinary order was authorized by state law, the absence of a settled legislative plan to disadvantage a durable interest group like urban voters can hardly serve to take the case outside *Reynolds*’ admonition against “sophisticated as well as simple-minded modes of discrimination.” If it could, *Reynolds*’ express condemnation of stuffed ballot boxes (a practice that has probably never been part of a settled legislative plan) would be nonsensical.

It is true, of course, that *Reynolds* never said that the treatment of voters must be *perfectly* equal.<sup>34</sup> That would be impossi-

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34. See, e.g., *Reynolds*, 377 U.S. at 577 (“We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement.”) (footnote omitted)).

ble, and the Court has, for example, permitted a variety of deviations from the equipopulation requirement for legislative districts.<sup>35</sup> But it is also true that *Reynolds* must be read to cover some situations on which the Court has not already precisely ruled, including cases that fall outside the "skewed district" rubric. And Professor Tribe himself later admits that this is true: "No one doubts that the *Reynolds* line would prevent a state from adopting a system in which those who tally machine-rejected ballots manually are instructed to toss out ballots with ambiguous marks indicating an intent to vote for Bush but to count all the votes for Gore."<sup>36</sup>

The Supreme Court concluded that the facts in *Bush v. Gore* are more like this hypothetical than like the innumerable situations in which minor or unavoidable deviations from perfect equality are permissible. The nature of the Supreme Court's equal protection jurisprudence has produced a huge range of cases in which a decision either way would be neither indisputably correct nor impossible to defend. *Bush v. Gore* falls within that range, though the Court's holding is extremely easy to defend. Even granting that it may not be absolutely unchallengeable, Professor Tribe's attempt to dismiss the Court's conclusion as untenable is itself untenable.

Implicitly abandoning his "skewed district" explanation for *Reynolds*, Professor Tribe reframes the Court's prohibition against "sophisticated as well as simpleminded modes of discrimination" as an affirmative requirement that "the method of counting [be] fair."<sup>37</sup> Professor Tribe then asserts that the procedures adopted by the Florida Supreme Court "certainly passed

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35. Similarly, the Court has not used *Reynolds* to condemn all forms of gerrymandering, which certainly do entail "sophisticated modes of discrimination." See *Davis v. Bandemer*, 478 U.S. 109 (1986). Professor Tribe invokes this case for the proposition that the Court has permitted "just the sort of partisan politicking the *Bush* Court seemingly wanted to exclude." Tribe, 115 Harv. L. Rev. at 223 (cited in note 1). Unfortunately for that argument, there was no majority opinion in *Davis*, and the result in the case might well be explained by an implicit recognition of the impossibility of identifying "ungerrymandered" apportionment schemes that would pass constitutional muster if gerrymandering were outlawed. Cf. 478 U.S. at 144-61 (O'Connor, J., concurring in the judgment) (arguing that if the principle underlying the plurality's "nebulous standard" for evaluating partisan gerrymanders were taken seriously, it would lead to the abolition of district-based representation in favor of a proportional representation system).

36. Tribe, 115 Harv. L. Rev. at 224 (cited in note 1). See also *id.* at 222 n.195 ("Even under traditional doctrines, counting the ballots of Palm Beach County twice and those of Broward County just once, for instance—giving Palm Beach voters twice as much influence on the outcome as Broward voters—would violate the Equal Protection Clause.").

37. *Id.* at 224.

this test.”<sup>38</sup> The principal basis for this startling conclusion is that “[n]othing in the record indicated that the Florida Legislature, the state judiciary, or the county recount teams intended to discriminate against any class, suspect or otherwise . . .”<sup>39</sup>

First, Professor Tribe is once again wrong to assume that intentional discrimination is a necessary element of an equal protection claim under the voting rights branch of equal protection doctrine. *O’Brien* vividly illustrates the absence of such a requirement, and Professor Tribe cites no case in which the Court has rejected such a claim for failure to prove discriminatory intent. It is quite true that nobody proved that the four judges in the Florida Supreme Court majority had acted with the discriminatory intent that is required in cases arising under the suspect-class branch of equal protection doctrine. It is also quite irrelevant.

Furthermore, assuming that we should accept Professor Tribe’s characterization of *Reynolds*’ rationale as a “fairness” rationale, can one really maintain with a straight face that all of the elements of the Florida court’s order were fair? Consider some examples of how Professor Tribe attempts to do so.

Miami-Dade had begun its recount with more heavily Democratic precincts and never got around to recounting more Republican precincts.<sup>40</sup> Notwithstanding this obvious partisan bias, the Florida court ordered that Gore be credited with all the votes that he picked up in this partial recount, and did *not* require that the recount be completed. Professor Tribe defends this bizarre ruling because of the incentive effects it supposedly creates:

[A] rule that permits inclusion of all legal votes identified through the preliminary manual recount, and *only* those votes, encourages each candidate to mobilize the county canvassing boards to count *all* votes in the precincts that the candidate deems most favorable. Including partial results thereby increases the likelihood that *complete* results will be obtained, a fact that a backward looking analysis, taking the U.S. Supreme Court’s later intervention for granted, neglects.<sup>41</sup>

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38. *Id.*

39. *Id.* at 225-26.

40. See Trial Transcript, *Gore v. Harris*, No. 00-2808 (Leon Cty. Jud. Cir. Dec. 2, 2000) at 461-83 (unrebutted testimony of Thomas Spencer) (transcript available at <<http://election2000.stanford.edu>>).

41. Tribe, 115 Harv. L. Rev. at 215-16 (cited in note 1) (emphasis in original).

A "backward looking" analysis, however, is exactly what the Florida court adopted, for no one had ever imagined such a rule until Gore asked the Florida courts to invent the rule and apply it retroactively.<sup>42</sup> So here is Professor Tribe's concept of "fairness": In response to a Democratic candidate's demand for a recount in a heavily Democratic county, a canvassing board dominated by Democrats elected in partisan elections begins recounting the more heavily Democratic precincts, and does not recount the ballots in more Republican precincts. And it is "fair" for a court to give the Democratic candidate the benefit of this partial recount, thereby possibly changing the result of an election for President of the United States, in order to encourage future candidates in future elections in Florida to "mobilize" local officials of their *opponents'* party to comply expeditiously with demands made by the candidates' *opponents*. No disinterested commentator could possibly call this "fair."

Even the Florida court's majority recognized the gross unfairness of conducting a recount of just those jurisdictions chosen by one of the candidates and his partisan allies, which is why these judges directed, *sua sponte*, that some kind of statewide recount be initiated. And when the United States Supreme Court also acknowledges the patently discriminatory nature of the Miami-Dade partial recount, can one really respond by saying "EQUAL PROTECTION, MY ASS!"? This is not the balanced and measured analysis that Professor Tribe promised at the outset of his essay, and I do not believe that it reflects a notion of "fairness" that deserves the name.

Consider next the Florida court's decision to overlay a selective statewide reexamination of "undervote" ballots after accepting a recount of *all* ballots in certain counties (and parts of certain other counties) selected by Gore and his fellow Democrats. The Supreme Court concisely explained why there is a "fairness" problem with this procedure:

A manual recount of all ballots identifies not only those ballots which show no vote but also those which contain more than one, the so-called overvotes. Neither category will be counted by the machine. This is not a trivial concern. At oral

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42. The novelty of the Florida court's recount order is indisputable, for nothing like this had ever been done in Florida. That point is quite separate from the question whether the novel recount order was based on a defensible interpretation of the Florida statutes. I do not believe that it was, see Lund, 23 Cardozo L. Rev. at 1235-43 (cited in note 6), but the equal protection problems with the recount order would be the same whether or not the order was based on a correct interpretation of the Florida statutes.

argument, respondents estimated there are as many as 110,000 overvotes statewide. As a result, the citizen whose ballot was not read by a machine because he failed to vote for a candidate in a way readable by a machine may still have his vote counted in a manual recount; on the other hand, the citizen who marks two candidates in a way discernible by the machine will not have the same opportunity to have his vote count, even if a manual examination of the ballot would reveal the requisite indicia of intent. Furthermore, the citizen who marks two candidates, only one of which is discernible by the machine, will have his vote counted even though it should have been read as an invalid ballot.<sup>43</sup>

So far as I can see, Professor Tribe offers no "fairness" rationale at all for limiting the statewide recount to undervote ballots, and no response at all to the Supreme Court's analysis.<sup>44</sup>

If a rule limiting recounts to "undervote" ballots had been adopted in advance of the election, when nobody could know which candidate would be helped by it, one might try to defend it as a harmlessly arbitrary rule. But that is not at all what happened here. Whether or not the Florida statutes could be interpreted to authorize the Florida courts to invent rules like this one, it was a completely novel procedure invented for the occasion by the Florida court. Even if we assume that Bush and Gore were equally likely to pick up votes in a recount of undervote ballots, Bush had already come out ahead in the machine counts, so the rule could only benefit Gore. And, for the reasons given by the Supreme Court, one could not maintain with a straight face that the arbitrarily limited recount ordered by the Florida court would provide a more accurate determination of which candidate received more votes in Florida.

#### B. WAS THE LAW APPLIED BY THE SUPREME COURT SENSELESS?

This comparison between the accuracy of the machine count and of the recount ordered by the Florida court brings us to Professor Tribe's deepest, and most deeply misleading, criticisms of

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43. 531 U.S. at 107-08.

44. Professor Tribe misleadingly points out that preexisting Florida law did not permit the counting of overvotes. Tribe, 115 Harv. L. Rev. at 237 & n.267 (cited in note 1). Florida law did treat ballots containing votes for more than one candidate as invalid. But the law also treated ballots containing votes for no candidate (undervotes) as invalid. And neither fact has anything to do with the issue in the case, which was whether certain ballots would be *reexamined* to see whether the counting machines had or had not classified them according to the applicable legal standard.

*Bush v. Gore*'s equal protection analysis. The essence of that criticism begins with the proposition that *every* mode of counting ballots contains biases and inaccuracies of various kinds, which implies that there are many defensible ways of conducting an election, none of which can be said to be inherently superior to the others. Professor Tribe argues that the machine recounts and the recount ordered by the Florida court were both within an acceptable range of imperfection, and that the Supreme Court therefore could have no principled basis for choosing one over the other:

[N]o uniform set of statewide counting standards could begin to account for all the differences in the design and thickness of ballots; in the form and maintenance of tabulation equipment; and in the age, political leanings, and other demographic characteristics of distinct areas yielding errors of either false exclusion or false inclusion (including its most extreme variant, false reversal). No uniform set of standards can in the end minimize the aggregate number of errors or come any closer to approximating what the Court deemed the applicable ideal of "one person, one vote."<sup>45</sup>

Analytically, there actually is something to this argument. In an election that was this close, I agree, it really is impossible to say that the vote totals certified by Florida's Secretary of State were certain to be more accurate (or were demonstrably more likely to correctly identify the winner of more votes) than whatever totals would have emerged from the recount ordered by the Florida court.<sup>46</sup> But that does not undermine the equal protection analysis in *Bush v. Gore*, for several reasons.

First, to the extent that one takes this analysis seriously, it implies that the *Reynolds* line of cases was wrongly decided. That line of cases, it should be recalled, does not categorically forbid vote dilution or require absolute adherence to the "one person, one vote" ideal. Rather it subjects vote-dilution practices to strict scrutiny. Just to take one obvious example of the difference this makes, the Court has not required districts to be appor-

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45. *Id.* at 257.

46. Some media reports have carelessly suggested that Bush would have emerged the winner if the recount ordered by the Florida court had been completed. In fact, however, the recount initiated by the Florida court was not proceeding according to fixed standards, and thus there is no way to know how the innumerable questions that would have arisen before it was finished were going to be resolved. For a useful elaboration on this point, see Einer Elhauge, *Florida 2000: Bush Wins Again!*, *The Weekly Standard* 29-31 (Nov. 26, 2001).

tioned based on a census taken on the very day an election is held. Similarly, to take a slightly less obvious example, the Court has allowed apportionment to be based on total population rather than the population of eligible voters. But the existence of these and many other deviations from the Court's "one person, one vote" ideal (some of which are identifiable and some of which are presumably undiscovered) has not been taken to imply that the various forms of vote dilution that the Court has invalidated are indistinguishable from those that the Court has permitted.

One can argue about whether the Court has drawn the lines in appropriate places, but one cannot rely on Professor Tribe's analytical argument without demolishing the foundations on which the *Reynolds* line of cases rests: his analysis inexorably leads to the conclusion that voting practices that result in vote dilution should be subject only to rational-basis scrutiny. Under rational-basis scrutiny, *Reynolds* itself would have been wrongly decided, for there are a number of legitimate government purposes that can be served by malapportioned districts, as the Court acknowledged.<sup>47</sup> But Professor Tribe does not repudiate *Reynolds*. On the contrary, he expressly *embraces* what he calls the "nurturing earth" of that decision.<sup>48</sup>

And even if one could reinterpret *Reynolds* and related cases as adopting a rational-basis standard of review,<sup>49</sup> one could still not use that reinterpretation to impugn the decision in *Bush v. Gore* because the Florida court's order in that case was far more irrational than some of the malapportionment schemes that the Court has declared unconstitutional. At least some aspects of the Florida court order at issue in *Bush v. Gore* were so arbitrary that even Justices Souter and Breyer acknowledged that the Equal Protection Clause had been violated. Neither of the other dissenters (Justices Stevens and Ginsburg) even at-

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47. E.g., *Reynolds*, 377 U.S. at 579-81.

48. Tribe, 115 Harv. L. Rev. at 274 (cited in note 1).

49. Some of the Court's opinions, including *Reynolds* itself, contain isolated phrases that suggest the use of rational-basis scrutiny. Those same cases, however, also contain language that points toward the use of strict scrutiny, and, more important, the analysis actually used is clearly the kind of analysis that is now conventionally called strict scrutiny. In *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802 (1969), a case relied on by Justice Ginsburg in her *Bush v. Gore* dissent, the Court really did sound as though it was employing rational-basis review. But in a subsequent case, which Justice Ginsburg tellingly did not cite, the Court dispelled that apparent implication by characterizing *McDonald* as a case in which no review at all was required because it was a vote-denial case in which the plaintiffs had failed to prove that they were actually prohibited from voting. *Goosby v. Osser*, 409 U.S. 512, 520-21 (1973).



tempted to explain how the Florida court's order could be reconciled with the principles articulated in *Reynolds*, and Professor Tribe never succeeds in doing so either.

Furthermore, let us assume for the sake of argument that the counting processes that led to Bush's certification as the winner of the election may have contained so much unjustifiable nonuniformity that it violated the Equal Protection Clause. Even if that were true, the fact remains that nobody proved any such thing in court. Indeed, Gore never alleged any such thing.<sup>50</sup> It simply cannot be that the Supreme Court is required to conduct an independent investigation of all of the unchallenged election practices that a state employs before it can declare that a challenged election practice is unconstitutional. The Supreme Court certainly did not do any such thing in *Reynolds*, nor could it have done so. Neither could it have done so in *Bush v. Gore*.

It is perfectly true that the impossibility of eliminating all inequalities in a state's election processes means that the courts should not jump to invalidate practices for which there are no apparent good alternatives. Such an approach would be asinine, and would invite a variety of opportunistic litigation strategies by disappointed candidates and their supporters. But that is not what happened in *Bush v. Gore*. There are obviously many ways of counting ballots that do not entail anything like the arbitrary and biased recount procedure ordered by the Florida court. A hand recount of *all* the ballots in Florida is one obvious example. The initial machine counts of the ballots is another. It simply is not the case that the underlying count that Gore was challenging obviously entailed anything comparable to the arbitrary and biased features that the Supreme Court found in the recount procedure that it struck down.

Finally, one should note that one of the many questionable practices that the *Reynolds* Court did *not* examine was partisan gerrymandering, notwithstanding the fact that much of the effect of malapportioned districts can be reproduced through this de-

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50. Professor Tribe quietly and indirectly acknowledges as much when he states that Gore's lawyers "raised the issue of the unreliability of the underlying count" in a footnote in a *different case* arising from the Florida election dispute. Tribe, 115 Harv. L. Rev. at 260 n.371 (cited in note 1). This footnote did not really raise or argue any legal issue at all, for it merely described how "undervote" ballots can be produced in punch-card voting systems, and noted that any votes "reflected" on such ballots would not be counted unless a manual recount were conducted. In neither this case nor in *Bush v. Gore* did Gore claim that the underlying count violated the Equal Protection Clause or any other provision of the Constitution.

vice.<sup>51</sup> Professor Tribe is quick to point out that in *Davis v. Bandemer* the Court was much more tolerant of such gerrymandering than of malapportionment.<sup>52</sup> And it is certainly true that the *Davis* Court did not explain how the result in that case fit with the principles of *Reynolds*. Although one wouldn't know it from reading Professor Tribe's article, however, the *Davis* Court didn't really explain much of anything because there was no majority opinion, and the concurring opinions that produced a majority for the judgment were analytically incommensurable with each other. More fundamentally, however, *Davis* revealed that a serious effort to follow *Reynolds*' logic in the context of partisan gerrymandering would culminate in the replacement of district-based representation with proportional representation. The *Reynolds* Court clearly did not contemplate so monumental a restructuring of our political system, and the Justices were understandably reluctant to go down that road in *Davis*.

All of which tends to confirm that Justice Harlan was right when he argued in his *Reynolds* dissent that this was an ill-considered decision, based on slogans rather than any analysis of the Constitution, and adopted without an appreciation of its radical implications. Maybe that means that *Reynolds* should be overruled. Or maybe it means that the Court should expressly limit *Reynolds* to its facts, and declare that its principles will not be applied elsewhere. But what it cannot mean is what Professor Tribe seems to conclude: that any method of counting votes is constitutional under *Reynolds* if it satisfies his personal, intuitive, and very peculiar, standards of "fairness":

Put bluntly, *Reynolds* clearly supports some small degree of inaccuracy in the count so long as the method of counting is fair, and *Davis* contemplates a large dollop of politics in developing the method of counting. The procedure that the Florida Supreme Court developed to implement the enactments of the Florida Legislature—a procedure that included representatives of the candidates and was overseen by an impartial magistrate—certainly passed this test.<sup>53</sup>

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51. The *Reynolds* Court did note that a state might legitimately wish to discourage such gerrymandering, 377 U.S. at 581, but it made no effort to compare the vote-diluting effects of gerrymandering with those of malapportionment. For a useful comparison of the two techniques, see Daniel Polsby and Robert Popper, *The Third Criterion: An Inquiry Into the Use of Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301 (1991).

52. E.g., Tribe, 115 Harv. L. Rev. at 223 (cited in note 1).

53. Id. at 224 (footnote omitted).

As we have seen, Professor Tribe's idea of "fairness" is untenable. But there is a second reason why a comparison of the machine count with the court-ordered recount does not undermine the equal protection analysis in *Bush v. Gore*. In a footnote to the passage just quoted, Professor Tribe appears to suggest that under *Reynolds* and *Davis* a counting process can be "fair" even if the designer of the process knows the probable outcome of the design.<sup>54</sup> Why? Because "apportionment is invariably designed in full knowledge of its probable consequences."<sup>55</sup> But while this is inevitably true of apportionment, it is *not* inevitably true of processes for counting votes. Which, I suppose, is why Professor Tribe concedes that counting all the ballots on which Gore's name was marked, but not the ballots on which Bush's name was marked, would violate *Reynolds*.<sup>56</sup>

Now suppose that the Florida court had decreed that the ballots would be counted by several different methods, all of which were within a tolerable range of imperfection, and that Gore would be declared the winner if he came out ahead in any one of these various recounts. Professor Tribe would probably concede that this was "unfair" and that it would violate *Reynolds*. But suppose that one candidate was declared the winner after the ballots were counted in the usual manner (a manner that was, so far as any court could know at the time, within a tolerable range of imperfection), and the ballots were then ordered recounted in a novel and arbitrary way. This, of course, is *Bush v. Gore*. Given that one candidate had already come out ahead after the ballots were counted in the usual way, this could hurt only that particular candidate, and it could help only his opponent. Notwithstanding this undeniable fact, and notwithstanding that this fact was knowable with absolute certainty when the novel and arbitrary recount was invented, Professor Tribe declares that this "certainly" passes a fairness test. Nothing could be less certain.

Thus, although Professor Tribe spends many pages scrutinizing the processes that led to the certified results in the Florida election, diligently searching for every possible example of non-uniformity in the way that ballots were counted by election offi-

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54. Professor Tribe doesn't quite say this. Instead, he juxtaposes a statement about the *designers* of apportionment with a statement about the *counters* of votes. But he must be trying to defend the vote counting process designed by the Florida court, for otherwise his footnote would be pointless.

55. Tribe, 115 Harv. L. Rev. at 224 n.206 (cited in note 1).

56. *Id.* at 224.

cials in Florida's sixty-seven counties,<sup>57</sup> he ignores the most salient difference between the initial counting processes and the court-ordered recount. Nobody knew or could even guess how the various and uncoordinated decisions of officials in all these counties might affect the outcome of any election, while nobody could *fail* to see that the court-ordered recount could help only one particular candidate.

Both equal protection doctrine and any disinterested concept of fairness require that the adoption of such a patently biased arrangement be subjected to close scrutiny. The *Bush v. Gore* Court properly asked how this recount could be justified. Nobody has provided any reasoned justification for it. Not the four Florida judges who adopted it over the strong objections of their three dissenting colleagues. Not the two dissenters in *Bush v. Gore* who refused to agree with the other seven members of the Court. And not Professor Tribe. "EQUAL PROTECTION MY ASS!" may be an understandable expression of partisan emotion by disappointed political activists, but it is not a slogan that deserves to be given academic respectability.

## II. THE POLITICAL DOCTRINE QUESTION

When Professor Tribe said that "*Davis* contemplates a large dollop of politics in developing the method of counting," he prefigured a separate and independent objection to the decision in *Bush v. Gore*. Whatever one thinks of the Court's equal protection analysis, the decision would be wrong if the case was nonjusticiable under the so-called political question doctrine. And, in fact, Professor Tribe asserts without qualification that this was indeed a nonjusticiable case.<sup>58</sup> In defending this assertion, Professor Tribe employs arguments that are even more spectacularly indefensible than those he used to attack the Court's equal protection analysis.

Let's begin with what the Court did. As Professor Tribe correctly notes, the Court simply ignored the political question doctrine. Less correctly, he sardonically treats this as an amazingly irresponsible suppression of an obviously relevant consideration:

How remarkable was it that neither the Court's per curiam opinion nor the Chief Justice's concurrence so much as mentioned the political question issue, much less attempted to jus-

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57. Id. at 254-63.

58. Id. at 280.

tify its assertion of authority in the face of the seemingly applicable political question doctrine? It's hardly the sort of thing a Supreme Court Justice simply forgets about. And even if it were, the briefs called the attention of the Justices to the problem.<sup>59</sup>

In a footnote appended to this passage, Professor Tribe cites two amicus briefs. One of them made a nonjusticiability argument, but it was filed in a *different case* that did *not* involve any equal protection issues.<sup>60</sup> The other brief, which was at least filed in *Bush v. Gore*, made only a passing reference to the political-question doctrine, without arguing that the case was nonjusticiable. And what about the briefs that *Professor Tribe himself* filed in these two cases? None of those briefs contains *any mention* of nonjusticiability or of the political-question doctrine, and none of them contains *any reference* to the amicus briefs to which he now says the Court should have paid such close attention.

One might ask the same kind of sardonic questions about Tribe the litigator that Tribe the commentator asks about the Supreme Court.<sup>61</sup> But perhaps it will be more profitable to note that the dissenters in *Bush v. Gore* also failed to argue that the case was nonjusticiable, just like the Court's majority and just like Tribe the litigator. Professor Tribe doesn't disclose this fact about the *Bush v. Gore* dissenters, and indeed one might be led to think the opposite by his comment that "Justices Breyer and Souter held their colleagues' feet to the fire on the point."<sup>62</sup> But it is true nonetheless: *nobody* on the Supreme Court contended that *Bush v. Gore* was nonjusticiable.

Justice Breyer's dissenting opinion contains a lengthy argument in which he energetically contends that the Court should have refused to decide the case on prudential grounds of judicial restraint, but Breyer never contends that the case was nonjusticiable. And Professor Tribe's current position is emphatically not the same as Breyer's. According to Professor Tribe:

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59. *Id.* at 279 (footnote omitted).

60. The case was *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000), which arose from litigation challenging the Florida Secretary of State's interpretation of the state laws that set deadlines for counties to complete hand recounts requested by Gore and his allies. It is worth emphasizing that the Supreme Court decided this case unanimously, and that not a single member of the Court endorsed the nonjusticiability argument proffered in the amicus brief, or even considered it worth mentioning.

61. As Peter Berkowitz has pointed out, in *Tribe vs. Truth*, *The Weekly Standard* 29, 33 (Feb. 4, 2002).

62. Tribe, 115 Harv. L. Rev. at 279-80 (cited in note 1).

[T]he only lawful choice [for the Supreme Court], not because of any theory of passive virtues or because the counsel of prudence so dictated, but rather because the Constitution so *commanded* the Court, was *not* to inject itself into the dispute.<sup>63</sup>

There are two very good reasons why neither Justice Breyer, nor any other member of the Court, nor any of the litigants, claimed that *Bush v. Gore* was nonjusticiable: *Baker v. Carr* and *McPherson v. Blacker*. *Baker v. Carr*,<sup>64</sup> the leading case on the political-question doctrine, decided that vote-dilution claims—that is, the very type of claim that *Bush v. Gore* upheld—are justiciable. That was not necessarily dispositive in *Bush v. Gore* because *Baker* did not involve a presidential election, but *McPherson v. Blacker* was indeed dispositive. That case raised several questions under Article II, the Fourteenth and Fifteenth Amendments, and the Electoral Count Act, and the Court held as follows:

It is argued that the subject-matter of the controversy is not of judicial cognizance, because it is said that all questions connected with the election of a presidential elector are political in their nature; that the court has no power finally to dispose of them; and that its decision would be subject to review by political officers and agencies, as the state board of canvassers, the legislature in joint convention, and the governor, or, finally, the congress.

But the judicial power of the United States extends to all cases in law or equity arising under the constitution and laws of the United States, and this is a case so arising, since the validity of the state law was drawn in question as repugnant to such constitution and laws, and its validity was sustained. *Boyd v. Thayer*, 143 U. S. 135. And it matters not that the judgment to be reviewed may be rendered in a proceeding for mandamus. *Hartman v. Greenhow*, 102 U. S. 672.

As we concur with the state court, its judgment has been affirmed; if we had not, its judgment would have been reversed. In either event, the questions submitted are finally and definitely disposed of by the judgment which we pronounce, and that judgment is carried into effect by the transmission of our mandate to the state court.<sup>65</sup>

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63. Id. at 280 (emphasis in original).

64. 369 U.S. 215 (1962).

65. 146 U.S. 1, 23-24 (1892).

The holding in this case was well known to all the Justices and all the litigants in *Bush v. Gore*. Only a few days before that decision, the Supreme Court had *unanimously* relied on *dicta* in *McPherson* when it vacated an earlier decision of the Florida Supreme Court in a different case arising from the disputed election.<sup>66</sup> Nobody could have contended with a straight face that this holding did not cover *Bush v. Gore*. And nobody tried.

Amazingly, however, Professor Tribe now contends that *McPherson* was not controlling. Here is his argument: *McPherson* dealt with a pre-election challenge to a state's mode of choosing electors whereas *Bush v. Gore* dealt with questions raised "in the heat of battle."<sup>67</sup> But the opinion in *McPherson* contains not the slightest hint of any such distinction.

Even more amazingly, Professor Tribe hints that the distinction he has invented finds support in a different set of precedents. He does this by citing a passage in his own treatise,<sup>68</sup> which compares *Gilligan v. Morgan*<sup>69</sup> with *Scheuer v. Rhodes*.<sup>70</sup> But the suggestion is baseless. *Gilligan* held that the political question doctrine precluded the issuance of an injunction "requiring initial judicial review and continuing surveillance by a federal court over the training, weaponry and orders of the [Ohio National] Guard, [because such an injunction would] embrace critical areas of responsibility vested by the Constitution in the Legislative and Executive Branches of the [federal] Government."<sup>71</sup> In the context of *Bush v. Gore*, an analogous case would involve "continuing regulatory jurisdiction,"<sup>72</sup> over Congress' exercise of its responsibilities under the Twelfth Amendment. Nothing remotely like this was at issue in *Bush v. Gore*. Contrary to Professor Tribe's characterization, moreover, *Scheuer* did not involve the same "question" that was presented in *Gilligan*.<sup>73</sup> *Scheuer* did not even address any political-question objection, so it could not and did not suggest any distinction between challenges brought "in advance" and those brought "in the heat of battle."

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66. *Bush v. Palm Beach Cty. Canvassing Bd.*, 531 U.S. 70 (2000).

67. Tribe, 115 Harv. L. Rev. at 283 (cited in note 1).

68. See *id.* at 282-83 & n.455.

69. 413 U.S. 1 (1973).

70. 416 U.S. 232 (1974).

71. 413 U.S. at 7 (footnote omitted).

72. *Id.* at 5.

73. Tribe, 115 Harv. L. Rev. at 283 n.455 (cited in note 1).

What could Professor Tribe possibly mean when he says that the Court's "only lawful choice" was to refuse to rule in *Bush v. Gore*? Nobody could seriously base such a sweeping and unequivocal claim on the completely novel distinction by which he tries to get around the holding in *McPherson*. The only possibility, I think, is that Professor Tribe must believe that his distinction between challenges brought "in advance" and those brought "in the heat of battle" is one dictated by the Constitution (though never previously recognized by the Court). That seems to be the implication of his claim that "the Constitution [] commanded the Court" not to decide this case,<sup>74</sup> or as he elsewhere says, that "[t]he requisite textual commitment to a political branch could hardly be clearer."<sup>75</sup>

Whatever merit there may be in the notion that the Constitution should be construed to commit the issues raised in *Bush v. Gore* exclusively to Congress (an interpretive suggestion that would require a great deal more elaboration than Professor Tribe provides), the one thing we know for sure is that the text of the Constitution does *not* expressly do any such thing. The Twelfth Amendment assigns certain tasks to Congress, and *Bush v. Gore* did not review Congress' performance of those tasks in connection with the 2000 election. Nor did the Court claim any power to do so. There simply is no case law, and no constitutional basis for any case law, that would conflate Supreme Court review of congressional actions under the Twelfth Amendment with Supreme Court review of a judicial decision by a subordinate state court.<sup>76</sup>

Nowhere in his article does Professor Tribe point to any "textually demonstrable" commitment to Congress of the exclusive power to review state court judgments for alleged violations of the Fourteenth Amendment in connection with presidential elections. His assertion that the Constitution "commanded" the Court to make a single "lawful choice" might best be described as unsupported. Or, adopting the language that Professor Tribe

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74. Tribe, 115 Harv. L. Rev. at 280 (cited in note 1).

75. Id. at 277-78 (footnotes citing the Twelfth Amendment and *Baker v. Carr*, 369 U.S. 215 (1962), omitted).

76. For that reason, Professor Tribe's cause is not advanced by his citation of *Nixon v. United States*, 506 U.S. 224 (1993). Tribe, 115 Harv. L. Rev. at 281-82 (cited in note 1). In that case, the Court refused to overturn an impeachment conviction rendered by the United States Senate, and the decision would have been relevant to a case in which the Court was asked to overturn a decision by Congress about the winner of a presidential election. But such a hypothetical case has nothing to do with *Bush v. Gore*, which merely reviewed the validity of a judgment by a subordinate state court.



uses to attack the Supreme Court, one might say that his assertion does "not fare too well in the 'truth in advertising' department."<sup>77</sup>

### III. WAS THE SUPREME COURT'S DECISION A POINTLESSLY SELF-INFLICTED WOUND BECAUSE BUSH'S TRIUMPH WAS INEVITABLE?

Amidst the dazzling and intricate argumentation in Professor Tribe's very lengthy commentary on *Bush v. Gore*, there is a tantalizing passage in which he argues that Bush would almost certainly have become President even if the Court had not decided this case in his favor, and that this would have been apparent to the Justices when they decided *Bush v. Gore*.<sup>78</sup> Professor Tribe's argument is straightforward: even if Gore had come out ahead in the Florida court's recount, Florida's Republican legislature or her Republican Secretary of State probably would have sent Congress the votes from a slate of Bush electors, and Congress probably would have accepted those votes.

This argument is tantalizing because it points in three somewhat different directions. First, it reinforces Professor Tribe's entirely appropriate refusal to join the many reckless commentators who have ascribed partisan motivations to the *Bush v. Gore* majority. Second, it tends to confirm Professor Tribe's claim that *Bush v. Gore* was part of a pattern of hubristic, antidemocratic decisions by a Court that has recently developed the bad habit of inserting itself into matters that ought to be left to the political process. And third, the argument subtly suggests that Professor Tribe himself has little reason to be influenced by partisan bias in his commentary: even if the Court had accepted the arguments in the briefs he filed, or the (substantially different) arguments that he now advances, Gore probably would not have become President. Or to put it slightly differently, Professor Tribe probably isn't suffering from what I called "acquired conviction syndrome" because he doesn't think that the litigation in which he participated could have accomplished the client's goal, even if he had prevailed. In the practically most important sense, this case was always a loser.

Can it really be that all of the intense litigation over Florida's electoral votes was essentially a waste of time because Re-

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77. Id. at 282.

78. Id. at 276-77. See also id. at 287.

publican elected officials were going to put Bush in the White House no matter what the courts did with Gore's lawsuit? Whatever Professor Tribe may believe, it appears that his co-counsel believes no such thing. At an academic conference about a year after the election, Ronald A. Klain was presented by a questioner with essentially the same argument that Professor Tribe makes here. Mr. Klain answered as follows:

I think it was always our view that if there was a recount in Florida that was determined to be lawful, consistent with the Constitution and showed that Al Gore had gotten more votes, that we really couldn't conceive that someone would take office contrary to that.

Whether it was through Governor Bush withdrawing or through a judicial proceeding that ordered a retrieval of the certificates of ascertainment and rival certificates being issued, you know, I just didn't—I never believed that either candidate, notwithstanding the machinations in the Florida legislature and everything else that was going on there, was prepared to take office contrary to the outcome of a recount that was determined to be legally valid. I just don't think that would have happened.<sup>79</sup>

In my view, Mr. Klain's analysis is clearly right,<sup>80</sup> and it is even more clear that it was offered in a spirit of candor. If a balanced evaluation of *Bush v. Gore* is ever to be written by one of the disappointed litigators in the case, Mr. Klain may be the one to do it.<sup>81</sup>

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79. *Bush v. Gore: A One Year Retrospective*, Federalist Society National Lawyers Convention, Nov. 17, 2001 (response of Ronald Klain to Professor Todd Zywicki) (transcript available at p. 81 of <<http://www.fed-soc.org/Publications/Engage/OnlineEngage.pdf>>)). Mr. Klain was one of the signatories of Gore's brief in *Bush v. Gore*, and Professor Tribe has had this to say about his role in the election litigation:

The credit for the strategy and tactics pursued before the county canvassing boards and in the state courts in the Florida vote-counting contest in fact belongs not solely to David Boies, brilliant strategist and tactician though he is, but also, and perhaps principally, to Ronald A. Klain, who had been Vice President Gore's extraordinary Chief of Staff in the White House and was his chief legal counselor during the election and in the recount litigation.

Tribe, 115 Harv. L. Rev. at 183 n.23 (cited in 1).

80. The validity of his analysis does not depend on the assumption that the recount ordered by the Florida court would have been conducted in a fair or lawful manner. Cf. Elhaug, *Florida 2000: Bush Wins Again!* (cited in note 46).

81. Mr. Klain has published an impressive defense of the Gore team's legal strategy that does not pretend to be a balanced or disinterested analysis of the Supreme Court's performance. Ronald A. Klain and Jeremy B. Bash, *The Labor of Sisyphus: The Gore Recount Perspective* 157-76, in Larry J. Sabato, ed., *Overtime! The Election 2000 Thriller* (Longman Publishers, 2002).

## CONCLUSION

Professor Tribe's commentary on *Bush v. Gore* exhibits a very high degree of skill in the arts of persuasion. But admirable skills can sometimes be used for improper ends. Here, Professor Tribe's goal is to advance two very grave charges against the Supreme Court. First, he contends that the holding in *Bush v. Gore* merits the contemptuously dismissive remark, "EQUAL PROTECTION, MY ASS!" Second, he claims that at least five Justices "have little but disdain for Congress as a serious partner in the constitutional enterprise, and not much patience with 'We the People' as the ultimate source of sovereignty in this republic."<sup>82</sup> Professor Tribe has simply failed to establish any foundation at all for such serious accusations.

He bases his indictment primarily on two propositions: that the Court's equal protection analysis is legally untenable, and that the case in any event raised only nonjusticiable political questions. As I believe I have shown, both propositions are unsustainable. What's more, Professor Tribe fails to come to grips with the facts that two of the *dissenters* in *Bush v. Gore* agreed that the Florida court had violated the Equal Protection Clause (as had three out of seven members of the Florida court itself) and that *none of the dissenters* argued that the case was nonjusticiable.

Professor Tribe's verdict is so far over the top that it might best be explained by reference to the "acquired conviction syndrome" described at the beginning of this paper. But whatever may explain it, the true House of Mirrors can be found in Professor Tribe's article, not in the Court's opinion in *Bush v. Gore*.

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82. Tribe, 115 Harv. L. Rev. at 290 (cited in 1).